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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

UNITED STATES OF AMERICA, PETITIONER

v.

HOMER O. CORRELL AND DOROTHY CORRELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The district court rendered no opinion. The opinion of the court of appeals (App. A, *infra*, pp. 9–12) is reported at 369 F. 2d 87.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1966 (App. A, *infra*, p. 13). By order of Mr. Justice Stewart, dated February 24, 1967, the time for filing a petition for a writ of certiorari was extended to and including April 28, 1967.

QUESTION PRESENTED

A salesman daily travelled by automobile on behalf of his employer to various towns and cities around his residence, usually covering 150 to 175 miles per day. He generally left his residence at 5:00 a.m. and returned at 5:30 p.m. The question presented is whether the amounts he expended for breakfast and lunch while on the road constitute deductible "traveling expenses * * * [incurred] while away from home in the pursuit of a trade or business" within the meaning of 1954 Code § 162(a)(2) or nondeductible "personal" or "living" expenses under Code § 262.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> (a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * * *
>
> (2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *
>
> * * * * *
>
> SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.
>
> Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

STATEMENT

Respondent[1] was a salesman employed by a wholesale grocery company with its principal place of business at Morristown, Tennessee. During the years 1960 and 1961, he traveled by automobile daily to various nearby towns and cities, where he sold his employer's goods to restaurants and other customers. On these trips, respondent usually left his residence in Fountain City, Tennessee, at about 5:00 a.m., drove for an hour or more and ate breakfast at a customer's place of business on his route for that day. He then carried on his sales activities until about 2:00 p.m., when he ate lunch, again at a customer's place of business. He finished his work schedule about 3:30 or 4:00 p.m., and returned to his residence about 5:30 p.m. He generally traveled a total of 150 to 175 miles daily. Respondent usually informed his employer in advance as to which customers' restaurants he would frequent each day, so that his employer could call him, if necessary, during his breakfast and lunch periods. Respondent's employer reimbursed him as well as its other salesmen for expenses incurred on their sales routes, including the actual cost of their meals. (App., *infra*, pp. 9–11; R. 45a–49a, 54a.)[2]

The Commissioner of Internal Revenue refused to allow respondent to deduct the cost of his meals eaten while traveling on his route. Respondent paid the resulting deficiency and sued for a refund. The jury

[1] Mrs. Correll is a party to this action only because joint return were filed; Mr. Correll will be referred to as respondent.

[2] "R." references are to the joint appendix filed by the parties in the court of appeals.

found for him. In a motion for a directed verdict and a motion for judgment notwithstanding the verdict, the government raised the question whether meal expenses of this type were non-deductible as a matter of law under § 162(a)(2) of the Code. The district court denied both motions. The Court of Appeals for the Sixth Circuit affirmed, rejecting the Commissioner's long-standing rule that the cost of meals incurred while traveling on business is not deductible unless the taxpayer remained away from home "overnight" (App., *infra*, pp. 11–12).

REASONS FOR GRANTING THE WRIT

1. The decision of the Sixth Circuit rejecting the Commissioner's "overnight" rule is in conflict with the decision of the Court of Appeals for the First Circuit in *Bagley* v. *Commissioner*, decided March 15, 1967 (App. B, *infra*, pp. 14–23), although in accord with *Hanson* v. *Commissioner*, 298 F. 2d 391 (C.A. 8), and *United States* v. *Morelan*, 356 F. 2d 199, 208–210 (C.A. 8).

The taxpayer in the *Bagley* case was a consulting engineer. His work for various power companies in the New England area frequently required him to travel to various towns located between 30 and 75 miles from his home. Typically, he left home at about 6:00 a.m. and returned at 10:00 p.m., eating three meals while traveling. The Commissioner's long-standing position is that a taxpayer has not incurred a traveling expense "away from home" unless his trip was of such duration that he was away from home overnight (or, alternatively, that he found it necessary to pause for sleep or rest) and thus that he in

all probability incurred lodging expenses. The First Circuit denied the claimed deduction on the ground that the Commissioner's long-standing position was a reasonable interpretation of the "away from home" requirement of § 162(a)(2). Recognizing the square conflict created by its decision in *Bagley,* the First Circuit criticized the observation of the court of appeals in the instant case "that [creating a workable standard for meal expense deductions] lies with Congress and not with the judiciary" (App. A, *infra,* p. 12), pointing out that the Treasury's sleep-or-rest rule "has worked adequately for many years, and that the remedy which is needed is to correct its unsettling by the judiciary itself" (App. B, *infra,* p. 17).

2. The long-standing "overnight-sleep-or-rest" rule, rejected by the court below but upheld in *Bagley,* constitutes a rational and administratively practicable reconciliation of § 262 of the 1954 Code, which proscribes income tax deductions for personal living expenses, with § 162(a)(2), which allows as a deduction the entire amount of expenses incurred for meals and lodging while traveling away from home in the pursuit of a trade or business. As its history demonstrates, § 162(a)(2)'s predecessor was designed to give a deduction to a taxpayer whose business trips required him to incur expenses which duplicated or exceeded his normal daily living expenses. The cost of a night's lodging while away from home on a business trip obviously duplicates the personal expense incurred by the taxpayer in maintaining his family residence. The cost of meals, on the other

hand, seldom involves a complete duplication of the taxpayer's normal personal expenses for food and drink, and such expenses may or may not exceed his usual meal expenditures. This is particularly so with lunches; there is no reason for denying a taxpayer a deduction for lunches eaten at a restaurant near his office, while at the same time permitting him or another taxpayer to deduct the full cost of lunches eaten on afternoon business trips to nearby towns, even though the lunch in the nearby town may cost no more than the lunch near his office.

Accordingly, the Commissioner has for more than 25 years interpreted § 162(a)(2) as permitting a deduction for meal expenses only when the taxpayer has been away from home overnight or for a sufficiently long period that he had to stop for sleep or rest, and thus is likely to incur duplicated expenses for lodging.[3]

Until 1962, the Commissioner's position on meals was uniformly accepted by every court which had con-

[3] I.T. 3395, 1940–2 Cum. Bull. 64; Rev. Rul. 190, 1953–2 Cum. Bull. 303, 305; Rev. Rul. 54–497, 1954–2 Cum. Bull. 75, 77–81; Rev. Rul. 55–109, 1955–1 Cum. Bull. 261, 262; Rev. Rul. 56–508, 1956–2 Cum. Bull. 126; Rev. Rul. 55–235, 1955–1 Cum. Bull. 274; Rev. Rul. 55–604, 1955–2 Cum. Bull. 49; Rev. Rul. 61–67, 1961–1 Cum. Bull. 25; Rev. Rul. 61–221, 1961–2 Cum. Bull. 34; Rev. Rul. 63–82, 1963–1 Cum. Bull. 33; Rev. Rul. 63–239, 1963–2 Cum Bull. 87; Treas. Regs. (under the 1954 Code), §§ 1.162–17(b)(3)(ii) and 1.162–17(c)(2).

The sleep-or-rest qualification was added to the "overnight" rule in order to cover employees, such as trainmen, who, because of their long hours of work, incur expenses, sometimes during the day, in order to pause for sleep or rest. See *Williams* v. *Patterson*, 286 F. 2d 333 (C.A. 5); Rev. Rul. 61–221, 1961–2 Cum. Bull. 34.

sidered it.[4] Moreover, the Committee Reports to the 1954 Code demonstrate that Congress was well aware of the Commissioner's long-standing position that in order for such expenses to be deductible the taxpayer must be "away from home *overnight.*" S. Rep. No. 1622, 83d Cong., 2d Sess., p. 9; H. Rep. No. 1337, 83d Cong., 2d Sess., p. 9 (emphasis added). See also S. Rep. No. 1622, *supra,* p. 191, and H. Rep. No. 1337, *supra,* pp. A39–A40, also using the phrase "away from home *overnight*" (emphasis added).[5] However, in 1962 the Court of Appeals for the Eighth Circuit rejected the Commissioner's well-accepted position (*Hanson* v. *Commissioner,* 298 F. 2d 391) and the Sixth Circuit has now reached the same result in the instant case.

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[4] *Hathaway* v. *Commissioner*, decided November 14, 1944 (P–H Memo T.C., par. 44,369); *Drill* v. *Commissioner*, 8 T.C. 902; *Blatt* v. *Commissioner*, decided February 10, 1947 (P–H Memo T.C., par. 47,020); *Fairley* v. *Commissioner*, decided August 4, 1948 (P–H Memo T.C., par. 48,144); *Summerour* v. *Allen*, 99 F. Supp. 318, 320 (M.D. Ga.); *Osteen* v. *Commissioner*, 14 T.C. 1261; *Herrin* v. *Commissioner*, 28 T.C. 1303; *Fogle* v. *Commissioner*, decided November 10, 1959 (P–H Memo T.C., par. 59,214); *Smith* v. *Commissioner*, 33 T.C. 861; *Cummings* v. *Commissioner*, decided December 7, 1961 (P–H Memo T.C., par. 61,330); *Armstrong* v. *Commissioner*, 43 T.C. 733; *Montrud* v. *Commissioner*, 44 T.C. 208; see also *Amoroso* v. *Commissioner*, 193 F. 2d 583 (C.A. 1), certiorari denied, 343 U.S. 926, affirming a Tax Court decision of March 1, 1951 (P–H Memo T.C., par. 51,058).

[5] Moreover, as the First Circuit indicated in *Bagley*, the statute itself may require the result reached by the Commissioner *i.e.*, it may require the construction that a taxpayer's travels are not "away from home" in the statutory sense unless he requires both "meals and lodging" (App. B, *infra*, p. 20).

3. The issue in this case is of importance to hundreds of thousands of taxpayers whose pursuit of a trade or business requires frequent inter-city travel in the space of a single day. The decision below, rejecting the Commissioner's long-standing "overnight-sleep-or-rest" rule and suggesting no practical standard in its stead, will stimulate claimed income tax deductions for meal expenses that will have a substantial fiscal impact and will result in a great volume of costly and time-consuming litigation. This Court should therefore resolve the clear conflict among the circuits on the issue.[6]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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GILBERT E. ANDREWS,
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Attorneys.

APRIL 1967.

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[6] The instant case does not involve the question presented by *Commissioner* v. *Stidger*, decided March 20, 1967 (No. 173, this Term), *i.e.*, whether a taxpayer's "home" for tax purposes is his principal place of business or his residence. Regardless of whether respondent's "home" was Morristown (his employer's principal place of business) or Fountain City (where he resided), he did not incur the expenses here in question (for breakfast and lunch) "while away from" either place within the meaning of § 162(a)(2).

APPENDIX A

United States Court of Appeals for the Sixth Circuit

No. 16767

HOMER O. CORRELL and DOROTHY CORRELL, PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Decided November 29, 1966.

Before WEICK, *Chief Judge;* EDWARDS and PECK, *Circuit Judges.*

WEICK, *Chief Judge.* Taxpayer, Homer O. Correll, was a salesman, employed by a wholesale grocery company. He traveled by automobile daily to various cities in behalf of his employer, to make sales to restaurants, leaving his residence early in the morning and returning in the evening.

The question in this case is whether taxpayer may deduct the cost of his meals, for which he was reimbursed by his employer, as expenses incurred in the pursuit of his trade or business "while away from home" under Section 162(a)(2) of the Internal Revenue Code of 1954, 26 U.S.C. § 162(a)(2) (1958).

The Commissioner of Internal Revenue disallowed the deduction and assessed a deficiency. Taxpayer paid the tax, applied for a refund, and upon its denial sued in the District Court to recover the amount of payment.

The District Judge submitted the issues to a jury, which returned a verdict in favor of taxpayer, and judgment was entered on the verdict against the Government for the full amount of the refund, plus interest.

In its appeal, the Government contends that the District Court erred in not granting its motions for a directed verdict and for judgment notwithstanding the verdict. It is the position of the Government that the cost of meals was not deductible unless the duration of travel was so extensive as to require taxpayer to obtain sleep or rest. The Government concedes that if he had remained away from home overnight, he would have been entitled to the deduction for lodging and meals.

The facts were not in dispute. Taxpayer lived in Fountain City, Tennessee, which is a suburb of Knoxville. It is located about forty-five miles from Morristown, Tennessee, which was the location of the place of business of his employer. Taxpayer's territory included the cities of Madisonville, Engelwood, Etowah, Athens, Sweetwater, Lake City, Caryville, Jacksboro, LaFollette, and Jellico, all of which were located in eastern Tennessee. Taxpayer's employer required him to be in his territory at the beginning of the business day. To do so he had to arise at 4:30 o'clock A.M. in order to drive the necessary distance and to arrive in his territory at the required time. He was required to eat his breakfast and lunch at customers' restaurants, where his employer could reach him by telephone if necessary. He traveled from 150 to 175 miles each day, returning home about 5:30 o'clock P.M.

Taxpayer's employer reimbursed him for his expenses incurred for breakfasts and lunches. The Government contends that the amount of the reim-

bursement should be included in his income. It argues that no deduction for personal living expenses is allowed. 26 U.S.C. § 262 (1958). It states that most people engaged in business eat one or more meals away from home each day and are allowed no deduction therefor.

The Commissioner has for many years applied the "overnight rule" as the test of deductibility of expenses incurred for meals on business trips.[1] It was not until 1958, however, that regulations were adopted which mentioned for the first time the word *overnight*.[2]

The Tax Court has supported the Commissioner's view in a number of cases.[3] Other Courts have not.

The closest appellate case in point is *Hanson* v. *Commissioner*, 298 F. 2d 391 (8th Cir. 1962). In that case the taxpayer was in the contracting business in Washington, Iowa. He was held to have the right to deduct the cost of his meals on business trips away from the area of Washington, even though he returned home on the same day. The Court construed the plain language of the statute to mean what it says

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[1] 4A Mertens, Law of Federal Income Taxation, p. 345.

[2] Reg. §§ 1.162–17(b)(3)(ii), 1.162–17(b)(4) and 1.162–17(c)(2).

[3] *Mortrud* v. *Commissioner*, 44 T.C. 208 (1965); *Armstrong* v. *Commissioner*, 43 T.C. 733 (1965); *Smith* v. *Commissioner*, 33 T.C. 861 (1960); *Winn* v. *Commissioner*, 32 T.C. 220 (1959); *Herrin* v. *Commissioner*, 28 T.C. 1303 (1957); *Osteen* v. *Commissioner*, 14 T.C. 1261 (1950). However, in *Bagley* v. *Commissioner*, 46 T.C. 176 (1966) the Tax Court reconsidered its prior decisions and allowed a deduction for expense of meals incurred on business trips which did not last overnight. In stating that it would no longer apply the overnight rule in all situations the Tax Court, relying on *Hanson* v. *Commissioner*, 298 F. 2d 391 (8th Cir. 1962), decided to view each case in the future on its own facts.

and held that the Commissioner could not amend it by the insertion of the words "over night."

The Eighth Circuit adhered to the same rule in *United States* v. *Morelan,* 356 F. 2d 199, 208–210 (1965). Other cases which have disapproved the overnight test are: *Williams* v. *Patterson,* 286 F. 2d 333 (5th Cir. 1961) (expenses incurred by railroad conductor during layover); *Chandler* v. *Commissioner,* 226 F. 2d 467 (1st Cir. 1955) (travel expenses); *Scott* v. *Kelm,* 110 F. Supp. 819 (D.C. Minn. 1953) (automobile and travel expenses).

The theory of Section 162(a) is that the added cost of meals away from home is related to the pursuit of the taxpayer's business and thus should be deductible as an expense incurred in producing income. The Commissioner's "overnight" or "sleep or rest" rules bear no rational relation to the business necessity of the meal expense. Rather, they use a time element in testing deductibility. In an era of supersonic travel, the time factor is hardly relevant to the question of whether or not travel and meal expenses are related to the taxpayer's business and cannot be the basis of a valid regulation under the present statute. While the rule adopted by Appellate Courts may not always work satisfactorily, we believe that the remedy lies with Congress and not with the judiciary.

Under our ruling, the trial court could have directed a verdict in favor of the plaintiffs. It was not error for him to deny the Government's motions for a directed verdict and for judgment notwithstanding the verdict.

Affirmed.

JUDGMENT

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

NOVEMBER 29, 1966.

APPENDIX B

United States Court of Appeals for the First Circuit

No. 6812

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM A. BAGLEY, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

[46 T.C. 176]

March 15, 1967.

Before ALDRICH, *Chief Judge*; MCENTEE and COFFIN, *Circuit Judges.*

ALDRICH, *Chief Judge.* Taxpayer, a consulting engineer, maintained his office at his home in Milford, New Hampshire. During the taxable years 1960 and 1961 he was employed from time to time by various power companies in the New England area on a per diem basis. On many of these days he left home early, ate breakfast on the way, ate lunch at work, and stopped to dine on the drive back. His employers' places of business were from thirty to seventy-five miles distant, and taxpayer normally reached home about ten P.M. The sole question is whether he can deduct the cost of these meals [1] as "traveling expenses (including the entire amount expended for meals and

[1] Taxpayer sometimes remained at his place of work overnight. The Commissioner does not question the propriety of deductions for meals and lodging on those occasions.

lodging) while away from home in the pursuit of a trade or business." 1954 I.R.C. § 162(a)(2).[2]

For the 45 years that this provision has been on the books in substantially its present form the Commissioner has sought to apply a rule of thumb which, in general, has found favor with the Tax Court. See *e.g., Al J. Smith,* 1960, 33 T.C. 861; *Louis Drill,* 1947, 8 T.C. 902. Some other courts have been critical. See, *e.g., Hanson* v. *Commissioner, infra; Correll* v. *United States, infra.* We cannot find, however, that these courts have substituted anything better. Rather, we believe that to this area of almost unlimited factual variations their admittedly subjective approach brings neither clarification nor ease of application nor, even, overall fairness.

The Commissioner's rule was originally known as the overnight rule. Travel did not qualify unless the taxpayer was away from home overnight.[3] As a result of the decision in *Williams* v. *Patterson,* 5 Cir., 1961, 286 F. 2d 333, which the Commissioner accepted, this became known as the necessary sleep or rest rule—a trip long enough to require interruption for rest during the day is equivalent to being away overnight.[4]

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[2] This section was amended in 1962, but in a respect not presently pertinent. Revenue Act of 1962, § 4(b), 76 Stat. 960.

[3] See discussion in *Kenneth Waters,* 1949, 12 T.C. 414, 417. *Allan L. Hanson,* 1960, 35 T.C. 413, *rev'd, Hanson* v. *Commissioner,* 8 Cir., 1962, 298 F. 2d 391.

[4] In *Williams* the taxpayer was a railroad conductor. He left his home in Alabama every morning at about 6:45 A.M. and boarded a train which arrived in Atlanta at 12:15 P.M. He was then off duty until 6:15 P.M., at which time he departed on the return trip and arrived home at about midnight. During the stopover in Atlanta the taxpayer regularly had lunch at a hotel, rented a room and slept for several hours, and had dinner. The question at issue was whether or not his rest was "necessary," since at that time Rev. Rul. 54-497, 1954-2 Cum. Bull. 75, 78, permitted a deduction to a railway em-

We in no way disagree with *Williams*. It marked, however, the beginning of a broader attack on the rule. In *Hanson* v. *Commissioner,* 8 Cir., 1962, 298 F. 2d 391, the taxpayer was in the construction business. He was employed contemporaneously at several different job sites at substantial distances from his home. He normally checked in at his office in the morning, and then visited the various jobs, usually returning late at night. The court concerned itself principally with ruling that the overnight rule was without legal basis. Having determined this, it then decided the case on the ground that *Williams* v. *Patterson* justified the deduction of the lunches and dinners "albeit that the expense is 'personal in nature.'" *Id.* at 397. The court did not discuss the factual complications involved, or, apparently, note that *Williams* v. *Patterson,* where there was a substantial rest period involved, was a very different case.[5]

In the case at bar the Tax Court decided to follow *Hanson*. One judge, in concurring on special grounds, expressed what seems to us a poignant regret, that neither the *Hanson* decision nor the Tax Court in the present case had offered any guiding principles to take the place of the Commissioner's rule.

The most recent blow against the Commissioner's rule was struck in *Correll* v. *United States,* 6 Cir.,

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ployee who was released from duty to obtain "necessary sleep." The Commissioner contended that such rest was only necessary when required by the employer. The court rejected this to rule that when it was reasonable for the employee, due to the hours of his employment, to seek rest during his hours off a deduction would be permitted. The Commissioner acquiesced in this holding in Rev. Rul. 61-221, 1961-2 Cum. Bull. 34. See also I.T. 3395, 1940-2 Cum. Bull. 64.

[5] The court also relied upon our case of *Chandler* v. *Commissioner*, 1955, 226 F. 2d 467, which, for reasons pointed out *infra*, n. 11, we believe was wrongly decided.

1966, 369 F. 2d 87, 90. In permitting a traveling salesman who returned nightly for dinner to deduct his breakfast and lunch on the road, the court conceded that "the rule adopted by Appellate Courts may not always work satisfactorily," but concluded that "the remedy lies with Congress and not with the judiciary."

With all respect, we suggest that the Commissioner's rule has worked adequately for many years, and that the remedy which is needed is to correct its unsettling by the judiciary itself. Furthermore, we believe that the so-called "rule adopted by Appellate Courts" is not a rule at all, and not even a guide.

We start with the principle that both travel and meals away from home are not deductible if they are personal, as distinguished from business, expenses. 1954 I.R.C. § 262. If a taxpayer chooses to live in one locality and work in another, normally his travel from one to the other is regarded as being for his personal convenience. *Commissioner* v. *Flowers,* 1946, 326 U.S. 465.[6] It is equally clear that a commuter cannot deduct his lunch. *Cf. Fred M. Osteen,* 1950, 14 T.C. 1261. *But cf. Emmert* v. *United States,* S.D. Ind., 1955, 146 F. Supp. 322. Under such circumstances it would seem unfair to allow a deduction for lunch to a man whose business requires him to spend his eight hour day on the road, even though in a sense he is traveling. We have held against such a taxpayer. *Amoroso* v. *Commissioner,* 1 Cir., 1952, 193 F. 2d 583, *cert. den.* 343 U.S. 926 (traveling salesman). Nor do we suppose, if a commuter were required to work late

[6] A taxpayer who has more than one place of business could not choose to live at all of them. In that event at least some of the travel must be a business necessity. *Cf. Crowther* v. *Commissioner*, 9 Cir., 1959, 269 F. 2d 292; see *Chandler* v. *Commissioner*, 1 Cir., 1955, 226 F. 2d 467, discussed *infra*, n. 11.

at his place of business, that any court would distinguish between his lunch and his supper. *Cf. Jerome Mortrud,* 1965, 44 T.C. 208; *Fred G. Armstrong,* 1965, 43 T.C. 733; *Louis Drill,* 1947, 8 T.C. 902.

While, as has been pointed out, there are certain travel and other expenses of a purely personal nature, the manifest statutory purpose is to permit deductions when business activities require duplication. Lodging away from home may well be all extra expense.[7] However, even though a meal away from home may be more expensive, presumptively it is not all added cost. And, in fact, prior to the enactment of what is now section 162(a)(2) in 1921, the Commissioner had promulgated a regulation which permitted the deduction of only that part of the expenses for meals and lodging incurred while traveling "in an amount in excess of any expenditures ordinarily required for such purposes when at home." Treas. Reg. art. 292 (1920 ed.). The difficulties involved in calculating the "excess" under this regulation proved so onerous that the Treasury itself asked Congress to grant a deduction for the "entire amount" of such expenditures for meals and lodging.[8] Accordingly section 214(a)(1) of the Revenue Act of 1921, ch. 136, 42 Stat. 227, for the first time contained as a subcategory of ordinary and necessary business expenses the language that is now section 162(a)(2). Compare section 214 of the Revenue Act of 1918, ch. 18, 40 Stat. 1057. Hence taxpayers who incur meal expenses while traveling

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[7] *But cf. James* v. *United States*, 9 Cir., 1962, 308 F. 2d 204, where taxpayer, an unmarried traveling salesman, lived in hotels the year around. Properly, no deduction was allowed, on the theory that he had no "home" to be away from.

[8] See Statement of Dr. T. S. Adams, Tax Advisor, Treasury Department, Senate Hearings on Internal Revenue, September 2 and 13, 1921 (Confidential Committee Print, subsequently released for publication), pp. 50, 234–35.

away from home now receive a tax windfall in that, unlike taxpayers who pay for meals while "at home," they are permitted to deduct some expenses that are incontestably "personal" as that term is used in section 262, *i.e.*, that portion of their meal expenses that they would have incurred had they not been traveling.

This codified accounting convenience intensifies the windfall which accrues to taxpayers like Correll and Hanson as against such taxpayers as Osteen and Amoroso. It may well be the reason why the Commissioner sought to invoke the overnight rule. In any event, we think it a good reason to do so. We see no justification for allowing salesman Correll two meals, and salesman Amoroso none. Nor would we give Amoroso one and commuter Osteen none. Equally, we see no reason, to take a frequently referred to hypothetical, why a man who makes a quick trip to Washington, missing neither breakfast nor dinner at home, should be allowed his lunch merely because he is traveling more miles than Amoroso, the salesman who travels locally. The courts in *Hanson* and *Correll* do not discuss this inevitable question. We think, at best, that all they do is to push the dividing line somewhere else, with no avoidance of the ultimate necessity, and difficulty, of drawing it. At worst, they make the drawing of it considerably harder.[9]

We believe that fairness to the greatest number of people, and at the same time a practical administrative approach which will not permit every meal-purchasing taxpayer to take pot luck in the courts, is to accept the Commissioner's sleep or rest rule. If in some instances it be thought illogical, it is not uninter-

[9] It is not at all clear, for example, whether the court in *Hanson* would be prepared to grant a deduction to Amoroso. See 298 F. 2d at 397.

esting to note that the very circuit which has been relied on to justify a substantial assault on the Commissioner's rule is the one which has most succinctly pointed out that fairness and administrative consistency in this area are more important than the total pursuit of logic. See *Steinhort* v. *Commissioner,* 5 Cir., 1964, 335 F. 2d 496, 503–05.

Nor do we find the Commission's rule wide of the mark as a matter of statutory construction. Admittedly all travel is not "away from home." Not only have the courts recognized this even when travel was not strictly commuting, *Clarence J. Sapp,* 1961, 36 T.C. 852, *aff'd per curiam,* 5 Cir., 309 F. 2d 143, but, were the contrary interpretation given, in qualifying travel as "away from home" the statute would be redundant. Since a line must be drawn somewhere, it seems not unreasonable to say that the test of whether travel is away from home is whether it is so extensive as to require "lodging," *viz.,* that "meals and lodging" be read in the conjunctive. This construction arguably finds some historical corroboration.[10] We believe, in any event, that it is a reason-

[10] The Treasury Regulation in response to which the deduction for the entire amount of travel expenses was originally passed consistently used language like "railroad fares, and meals and lodging" as though meals and lodging were to be read together. Had it been intended that the words should be read disjunctively the phrase "railroad fares, meals, and lodging" would have been more appropriate. Treas. Reg. art. 292 (1920 ed.). Likewise, all versions of the statute since its enactment in 1921 have used the terms in conjunction in permitting the deduction of the "entire amount" expended on them. If this is not intended to suggest a connection between them it makes little sense, since even under the Commissioner's original regulation permitting the deduction of only the excess of the "entire amount" of expenditures, lodging would have been ordinarily deductible because it was a duplicated expense. The only case in which this would not hold true would be where one's

able compromise in what seems otherwise an impossible situation.

It would be an insuperable objection to the sleep or rest rule if not merely meals, but also business transportation costs, were deductible only if incurred in connection with lodging. However, in spite of the fact that section 162(a)(2) links the deduction of travel expenses with the deduction of meal costs, such correlation has not been uniformly required. *E.g.*, *Summerour* v. *Allen*, M.D. Ga., 1951, 99 F. Supp. 318; *Joseph M. Winn*, 1959, 32 T.C. 220. In some circumstances transportation may be an ordinary and necessary expense under the general provisions of section

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abode was sufficiently permanent to constitute a "home" and yet cost less to maintain when the taxpayer was away. It would seem that such a situation is sufficiently unlikely to occur, or if it does occur sufficiently unlikely to amount to any substantial avoidance of duplication, to indicate that it was not what Congress was primarily concerned with treating when it drafted the statute in question. Accordingly, if this analysis is correct the purpose of linking meals and lodging, rather than merely specifying the deduction of the "entire amount" of meals alone, is to indicate that a deduction is to be granted when expenses for both are incurred.

Admittedly when Congress enacted section 62(2)(B) in 1954, 1954 I.R.C. § 62(2)(B), providing for the deduction of travel expenses from gross income, the wording "expenses of travel, meals, and lodging" was used. However, the committee reports on that section also contain the only specific indication that Congress was aware of and accepted the Commissioner's interpretation of the statutory language. They state, "At present, business transportation expenses can be deducted by an employee * * * only if they are reimbursed by the employer or if they are incurred while he was "*away from home overnight.*" S. Rep. No. 1622, 83d Cong., 2d Sess., 9, 169; H.R. Rep. No. 1337, 83d Cong., 2d Sess., 9, A19. (Ital. suppl.) Therefore it seems reasonable to conclude, at the least, that the change in phraseology was not intended to alter the previous meaning of section 162(a)(2).

162. *E.g., Steinhort* v. *Commissioner,* 5 Cir., 1964, 335 F. 2d 496; *Clarence J. Sapp, supra. Cf.* I.R.C. § 62(2)(C). *But cf. Crowther* v. *Commissioner,* 9 Cir. 1959, 269 F. 2d 292; *Rice* v. *Riddell,* S.D. Calif., 1959, 179 F. Supp. 576.[11] The fact that some trans-

[11] A decision involving transportation only is our case of Chandler v. Commissioner, 1 Cir., 1955, 226 F. 2d 467. There taxpayer had two jobs, in two different places. We held that transportation to one was commuting and not deductible, but that the cost of traveling to the second could be deducted. Under ordinary circumstances this would be a sound result—the cost of transportation to the second job would seem a necessary and proper business expense. *Steinhort* v. *Commissioner, supra.* The difficulty is that taxpayer had taken the standard deduction, which at that time included, and therefore prevented additional itemization of, all "necessary and proper" business expense. Accordingly, Chandler had, in effect, received this travel deduction, if it were to be so categorized. Consequently, in order to permit taxpayer to recover, the court had to hold that travel to this second job, although, strictly, it was no greater in mileage or hours than commuting to the first, was "travel away from home," this being a deduction not included in the standard deduction.

We must agree with the Commissioner that this was an instance of a hard case making bad law. At that time the 1939 Code made a totally arbitrary distinction between employee taxpayers who incurred transportation expenses for which they were not reimbursed and those who were reimbursed. 1939 I.R.C. §§ 22(n) (2), (3). The former could deduct transportation expenses from gross income and take the standard deduction as well only if they were travel expenses incurred away from home on business, while the latter could take both deductions for all legitimate business transportation expenses. Additionally, self-employed taxpayers could also take both deductions. 1939 I.R.C. § 22(n)(1). Possibly because such a distinction between similarly situated taxpayers was grossly discriminatory the court strained to construe the transportation as involving travel away from home in order to rectify the inequity. This discrimination was eliminated by the enactment of section 62(2)(C) of the 1954 I.R.C. and the transportation expenses incurred by Chandler would today be deductible from gross

portation costs are deductible even where meals would not be not only removes the necessity of making a liberal interpretation of section 162(a)(2), but in itself suggests that "travel away from home" with its specific inclusion of meals and lodging, means travel in a substantial sense and not a diurnal round starting and ending at home.

On this basis the present taxpayer is not entitled to the deduction. Nor do we find it an answer to say that had he chosen to stay overnight, instead of coming home late, the result would have been otherwise. Not only in a rule of thumb, but in any application of principles there has to be a dividing line, and in as complex an area as this one the line is bound to be indistinct. It can become totally lost by talking equivalents.

We can think of no sharper place to draw the line, and since we also think of no better one, we accept what has long been the Commissioner's.

The decision of the Tax Court is vacated and the cause remanded for further proceedings.

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income under this section. However, we must conclude that the decision in *Chandler* is incorrect as a guide to the construction of section 162(a)(2). Compare *Kenneth Waters*, 1949, 12 T.C. 414 (dissenting opinion).

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